IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1276

DORTHA ALLEN GUY,
Petitioner,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Respondent.

No. 75-1264

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

FLETCHER L. HUDSON
CHARLES A. LAWRENCE, JR.
DONNA K. FISHER
McKNIGHT & HUDSON
Suite 2222 Clark Tower
5100 Poplar Avenue
Memphis, Tennessee 38137
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1276

DORTHA ALLEN GUY,
Petitioner,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Respondent.

No. 75-1264

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent Robbins & Myers, Inc. (Hunter Fan Division) files this single brief in opposition to the Petitions for a Writ of Certiorari filed by Dortha Allen Guy in No. 75-1276 and by the International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 790 in No. 75-1264.

QUESTION PRESENTED

Whether Petitioner has met the jurisdictional prerequisite necessary for maintenance of a court action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(d), by filing a timely charge with the Equal Employment Opportunity Commission within ninety (90) days from the alleged discriminatory act?

STATEMENT OF THE CASE

While Petitioners' statements of the case are generally accurate, they do contain certain misstatements which Respondent wishes to correct. Paramount among these misstatements is Petitioners' assertion that the Company's decision with regard to Ms. Guy's termination did not become final until the completion of the grievance process (Petition in No. 75-1276, p. 6). This statement is not accurate, and there is absolutely no evidence in the record below to support such an assertion.

Furthermore, Respondent does not agree with statements concerning the decision of the Sixth Circuit as to the retroactivity of the 1972 Amendments to Title VII, 42 U.S.C. § 2000e-5(e). The Court did not decide this issue because it was not properly before the Court. It was clearly stated by the Court that as the issue was not raised in the District Court, the Court of Appeals was not required to consider it. While the Court of Appeals did express their ideas on this issue, it was not a holding in the case. Indeed, if the Sixth Circuit had considered this issue properly before it, they undoubtedly would have remanded the issue to the District Court for its consideration.

REASONS FOR DENYING A WRIT

I. There Is No Real Conflict With Other Courts of Appeals Decisions as to Whether the Pendency of a Grievance Tolls the Limitation Period for Filing a Title VII Charge.

Petitioners state that the Sixth Circuit's holding that the pendency of a grievance does not toll the time limitation for filing a Title VII charge conflicts with decisions of the Fifth, Seventh, Ninth, and Tenth Circuits.[1] With the exception of *Sanchez v. Trans World Airlines, Inc.*, 499 F.2d 1107 (10th Cir. 1974), all of the Circuit decisions relied upon by Petitioners were decided prior to the decision of the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a decision clearly indicating that the limitation period of Title VII is *not* tolled by pursuit of a contractual grievance procedure.

In the one case decided subsequent to *Alexander v. Gardner-Denver Co.*, *Sanchez v. T.W.A.*, *supra*, the Tenth Circuit, contrary to Petitioners' assertion, does not hold that the time for filing a Title VII charge is tolled by the filing of a grievance. The issue before the Tenth Circuit in *Sanchez* was whether resort to arbitration bars subsequent court action pursuant to Title VII. The Tenth Circuit reversed the trial court's holding that the court action was barred. The question as to whether the pendency of a grievance tolls the time period for filing a charge with the Equal Employment Opportunity Commission (EEOC) was not relied upon by the trial court as a basis for its judgment and was raised by defendant-appellee before the Court of Appeals merely as an additional ground for affirming the trial court's

---

[1] Cases cited by Petitioners are: *Culpepper v. Reynolds Metals Company*, 421 F.2d 888 (5th Cir. 1970); *Hutchings v. United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972); *Malone v. North American Rockwell Corporation*, 475 F.2d 799 (9th Cir. 1972); *Sanchez v. Trans World Airlines, Inc.*, 499 F.2d 1107 (10th Cir. 1974).

judgment. The Tenth Circuit did not decide this issue but remanded it to the trial court for determination as the record did not disclose the date the grievance procedure was commenced or the date proceedings were completed.

Thus, the question presented in the instant case has never been squarely posed before the Tenth Circuit and has not been decided by that Court of Appeals. Although the Tenth Circuit expressed the view that the tolling rule was "in tune with the construction given by the Supreme Court and other federal courts to this kind of provision", the Court cites no Supreme Court case in support of its statement and cites only those Court of Appeals decisions which were decided prior to *Alexander v. Gardner-Denver Co.* The principles enunciated by the Supreme Court in *Alexander v. Gardner-Denver Co.* and *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973) *aff'd* 421 U.S. 454 (1975),[2] a case decided subsequent to *Sanchez v. T.W.A.*, make it clear that the legal remedies available for employment discrimination are "separate, distinct, and independent"[3] and the limitation periods for bringing actions under these various remedies should not affect or toll one another.

At the time *Sanchez* was decided, the Tenth Circuit did not have the benefit of the Supreme Court's elucidation on the tolling question as it relates to the various remedies, and at the time the Fifth, Seventh and Ninth Circuits issued their opinions on tolling, *Alexander v. Gardner-Denver Co.* had not been decided. The Sixth Circuit is, therefore, the only Court of Appeals which has decided the instant question subsequent to the Supreme Court's enunciations in both *Alexander v. Gardner-Denver Co.* and *Johnson v. R.E.A., Inc.*, and the holding of the

[2] The Supreme Court in *Johnson v. Railway Express Agency, Inc.* held that a charge filed with the EEOC does not toll the running of the limitation period for a court action brought under 42 U.S.C. Section 1981.

[3] *Johnson v. Railway Express Agency, Inc.*, 95 S. Ct. 1716, 1721.

Sixth Circuit is consistent with the principles expressed in these two cases.

In light of these recent Supreme Court decisions, this Court cannot assume the other circuits if presently faced with the instant question would continue to adhere to their previous views. Until the other Courts of Appeals carefully consider and decide the instant issue in light of the principles set forth in *Alexander v. Gardner-Denver Co.* and *Johnson v. R.E.A., Inc.* it cannot be said that a conflict exists among the circuits as to whether the pendency of a grievance tolls the limitation period for filing a Title VII charge.[4]

[4] Petitioner in No. 75-1276 requests alternatively that the instant case be held pending resolution by the Supreme Court of *McDonald v. Santa Fe Transportation Company*, 513 F.2d 90 (5th Cir. 1975) *cert. granted* 46 L.Ed. 2d 248 (1975); *Brown v. General Services Administration*, 507 F.2d 1300 (2d Cir. 1974) *cert. granted* 421 U.S. 987 (1975); and *Place v. Weinberger*, 497 F.2d 412 *cert. denied* 419 U.S. 1040 (1974). However, none of these cases concerns the question at hand. *McDonald*, for example, is readily distinguishable from the present case. In *McDonald* the Fifth Circuit held that 42 U.S.C., Section 1981 confers no actionable right on white persons and that discharge of white employees for misappropriation of company property, a charge not alleged by plaintiffs to be false, while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII. Because of the differences between the two cases, it is possible for the Supreme Court to dispose of *McDonald* without necessarily deciding the issue presented in the present case.

Both *Brown* and *Place* raise the issue of whether 42 U.S.C., Section 2000e-16(c), which allowed federal employees for the first time to bring suit in federal court for employment discrimination, may be applied to claims of discrimination which arose before its effective date but were awaiting final determination at that time. Thus, both cases revolve around the applicability of the doctrine of sovereign immunity, an issue in no way involved in the present case.

II. The Issue Raised by Petitioner Regarding the Retroactivity of the 1972 Amendments Does Not Warrant Review by This Court.

The issue of whether the 1972 amendments to Title VII, 42 U.S.C. § 2000e-5(e), may be applied retroactively so as to give the EEOC jurisdiction over Petitioner's claim is not properly before this Court and should not be reviewed. This issue was raised for the first time by the EEOC as *amicus curiae* in its brief to the Sixth Circuit Court of Appeals. The Complaint in this case contains no averment relating to the retroactivity of the 1972 amendments nor was the question litigated at the trial level. The Sixth Circuit held that as the issue of retroactivity was not raised in the District Court the Court did not have to decide this issue.[5]

The Supreme Court has long recognized that unless there are exceptional circumstances, only those questions which were definitively raised and litigated below may be reviewed. *Blair v. Oesterlein Co.*, 275 U.S. 220 (1927); *McGrath v. Manufacturing Trust Co.*, 338 U.S. 241 (1949); *California v. Taylor*, 353 U.S. 553 (1957). It is clear that the issue of retroactivity was never properly raised or litigated, and as there are no exceptional circumstances in this case, there is nothing to warrant the Supreme Court's review of this issue.

---

[5] By way of dicta, the Sixth Circuit noted that as Petitioner's claim was barred and extinguished prior to the effective date of the 1972 amendments, the increase of time to file charges allowed by these amendments could not revive Petitioner's claim. Petitioners argue that this is contrary to the Ninth Circuit's holding in *Davis v. Valley Distributing Co.*, 522 F.2d 827 (1975); however, *Davis* is distinguishable from the instant case. In *Davis*, plaintiff filed his charge on March 14, 1972 with the EEOC, which referred the charge to the Arizona Commission on March 29, 1972. Two days later the Arizona Commission returned the charge to the EEOC without further action. The Ninth Circuit held that as appellant's claim was not formally filed until the EEOC assumed jurisdiction after the claim was returned by the Arizona Commission, the charge fell within the literal words of the 1972 statute making the amendments applicable to all charges filed after the effective date March 24, 1972.

CONCLUSION

The holding of the Sixth Circuit is correct and consistent with applicable decisions of the Supreme Court. As there is no conflict among the circuits as to the tolling question and as the retroactivity issue is not properly before this Court, it is respectfully requested that the Petitions for a Writ of Certiorari be denied.

Respectfully submitted

FLETCHER L. HUDSON
CHARLES A. LAWRENCE, JR.
DONNA K. FISHER

McKNIGHT & HUDSON
Suite 2222 Clark Tower
Memphis, Tennessee 38137
Attorneys for Respondent

Certificate of Service

I hereby certify that on April 2, 1976, three copies each of the foregoing were mailed, air mail postage prepaid, to counsel of record, Barry L. Goldstein, 10 Columbus Circle, New York, New York 10019 and Ruth Weyand, 1126 Sixteenth Street N. W., Washington, D. C. 20036.

Charles A. Lawrence, Jr.